IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-906

UNITED AIRLINES, INC.,	)
Petitioner,	)
v.	)
HARRIS S. McMANN,	)
Respondent.	)

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

MOTION OF THE NATIONAL RETIRED TEACHERS ASSOCIATION, THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICI CURIAE (consent of petitioner refused)

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The National Retired Teachers Association and the American Association of Retired Persons are affiliated and jointly administered nonprofit corporations having a combined membership of over 10,000,000 people. The Gray Panthers is a nonprofit corporation having a nationwide membership and devoted to advocacy on behalf of the elderly with respect to legal and social issues particularly affecting their interests.

The above organizations believe, and have repeatedly taken positions in support of, the proposition that stereotyped notions concerning the ability of older workers are wrong. Specifically, the practice of mandatory early retirement is regarded by movants as one of the most pernicious forms of discrimination because of age. While movants believe the existing protections of the federal Age Discrimination in Employment Act are inadequate because of the upper age

limit, they also believe that those protections intended by the Act must be preserved.

When Congress enacted the Act in 1967 it took extraordinary pains to clarify the meaning of the employee benefit plan exception, 29 U.S.C. §623(f)(2), on the floor of both the House and the Senate. In the House, Congressmen Daniels, Dent, Randall, and Smith expressly and unequivocally addressed themselves to its meaning, 113 CONG. REC. 34745, 34746, 34747, and 34752, and their counterparts, Senators Javits and Yarborough, in a colloquy directed specifically and narrowly to the issue now before the Court, could not have been more explicit. 113 CONG. REC. 3124, 3125. Senator Young's concluding statement removed any possibility of a doubt concerning the meaning of the exception. 113 CONG. REC. 31256, 31257. The meaning intended by Congress, simply, is that the exception

was designed solely to permit employers to hire older workers without necessarily including them in benefit plans. That uncontrovertable legislative intent cannot be ignored. Train v. Colorado Public Interest Research Group, -- U.S. --, 96 S. Ct. 1938 (1976).

In promulgating an interpretive regulation, 29 C.F.R. §860.110, which sanctioned involuntary retirement before the age of 65 if effected pursuant to a benefit plan, the Secretary of Labor cavalierly engaged in an act of legislation which completely frustrated the intention of Congress to protect millions of workers from early retirement. See McMann v. United Air Lines, Inc., 542 F.2d 217 at 222 (1976).

It is submitted that movants can make an important contribution toward resolution of the issue of law before the Court. While the Secretary of Labor, who will appear as

amicus curiae, has altered his initial interpretation of the benefit plan exception, he has not completely abandoned the hypothesis that early retirement pursuant to a benefit plan might be justified under certain circumstances. See Zinger v. Blanchette, -- F.2d -- (3rd Cir. 1977)(Appendix A, Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari). In the lower court the respondent relied upon the Secretary of Labor's present interpretation (Appellant's Brief before the Fourth Circuit at 11) and the lower court apparently felt its decision was in harmony therewith. McMann v. United Air Lines, Inc., supra, 542 F.2d at 219 n. 4. Thus, the respondent need not challenge the Secretary's posture in order to obtain the relief afforded him in the lower court and, of course, the Secretary's amicus brief will hardly address the issue of law from

the perspective of your movants. It is reasonable to expect that bureaucratic paralysis will militate against the confession of initial error and in favor of an argument founded upon the value of changed interpretations in response to empirical experience. Your amici's contention is that there was, in the beginning, no room for interpretation and that an initial mistake created and perpetuated the confusion which brought the instant case to this Court.

Therefore, it is respectfully urged that the instant motion be granted.

DATED: March 15, 1977.

Respectfully submitted,

Philip L. Goar

Attorney for Movant

Of Counsel:

Robert B. Gillan, Esq.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1709 West Eighth Street, Suite 500, Los Angeles, CA 90017.

On March 16, 1977, I served the within MOTION OF THE NATIONAL RETIRED TEACHERS ASSOCIATION, THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICI CURIAE (consent of petitioner refused) on the attorneys in said action, by placing 3 copies thereof enclosed in sealed envelopes with postage fully prepaid, in the United States post office mail box at Los Angeles, California addressed as follows:

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Ronald J. James, Administrator
Wage and Hour Division
Employment Standards Administration
Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on March 16, 1977, at Los Angeles, California.

Robert B. Gillan